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IN THE

Supreme Court of the United States

October Term, 1944

No. 234

GRIEDER MACHINE TOOL & DIE COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Grieder Machine Tool & Die Company, prays that a writ of *certiorari* be issued to review the decree of the United States Circuit Court of Appeals for the Sixth Circuit entered on April 13, 1944, directing the enforcement of an order of the National Labor Relations Board.

Opinions Below

The United States Circuit Court of Appeals for the Sixth Circuit entered judgment on this cause on April 13, 1944. The decision, not yet officially reported, is set out in full at pages 395 to 402 of the record.

The decision and order of the National Labor Relations Board are reported in 49 N. L. R. B. No. 190, and are printed in the record at pages 75 to 80.

Jurisdiction

The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925 (28 U. S. C. 347), and under Section 10(e) and (f) of the National Labor Relations Act (29 U. S. C. 160(e) and (f)).

Statement of the Matter Involved

On May 29, 1943, the National Labor Relations Board entered its Order (R. 75-80) requiring petitioner:

1. To cease and desist from (a) discouraging membership in International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, or any other labor organization, (b) refusing to bargain collectively, and (c) in any other manner interfering with, restraining or coercing its employees in the exercise of the rights guaranteed by Section 7 of the National Labor Relations Act.

2. To reinstate one Henry Clabaugh and make him whole for any loss of pay he may have suffered by reason of his discharge.

3. Upon request, to bargain collectively with the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, as the exclusive representative of petitioner's employees.

4. To post in its plant notices that petitioner's employees "are free to become or remain members of International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Con-

gress of Industrial Organizations", and that petitioner will not discriminate against any employee "because of his membership or activity in any such organization".

Petitioner is an Ohio corporation organized in 1941 and located in Bowling Green, Ohio. (R. 94). It is engaged in the manufacture of precision gun and machine tool parts for the United States Army and Navy. (R. 94).

Because the skilled workmen needed for the manufacture of such products cannot in these war years be obtained in a rural community like Bowling Green, petitioner adopted a system of apprentice employment and training. (R. 287, 350). These apprentices were men without previous industrial experience who completed an elementary course in industrial machine operation. (R. 287). Such men were given probationary employment at a starting wage rate of 45¢ an hour and assigned to easily operated machines under close supervision. (R. 291). They were retained for a period long enough to test their ability and desire to develop into useful employees. (R. 291). The apprentice who developed satisfactorily was given wage increases from time to time and his employment finally made permanent. (R. 197). The unsatisfactory trainee received no such wage increases and was discharged at the end of the trial period. (R. 245, 349).

Clabaugh, whom the Board has ordered reinstated, was one of these trainees or apprentices. (R. 114, 275). Clabaugh came to the Grieder factory entirely lacking in experience in machine operation. (R. 118). His employment record demonstrated that he had been found unsatisfactory by his previous employers. (R. 115-120). He was still on W.P.A. in January, 1942. (R. 114). It was under W.P.A. auspices that he first came into the petitioner's plant in February, 1942, to take a four weeks W.P.A. course designed to fit him for a position of novice machine operator. (R. 114). While he took this training at the Grieder plant, he was entirely free of the petitioner's supervision. (R. 114, 278).

Clabaugh was placed on the Grieder pay roll in March, 1942. (R. 114). He was hired not out of charity, but because labor was scarce and skilled workers unavailable. He, like other inexperienced men, was hired with the hope that he would develop into a competent and useful machine operator. (R. 287, 291). He was hired at the beginners' rate of 45¢ an hour, and he was still making that rate at the end of six weeks when he was discharged. (R. 115). Those six weeks are a continuous record of incompetence and misconduct, of indifference to the advice and warnings of supervision, and of fast-mounting realization that Clabaugh was not making good and did not, in fact, desire to do so. Their inevitable culmination was discharge. Following Clabaugh's discharge, he worked for the Toledo Steel about four weeks, and then he drove a truck for a grocery for about three or four weeks. (R. 130). At the time of the hearing in January, 1943, he was a guard at the Willys-Overland. It is quite significant that this man held at least three jobs in the ten months following his discharge by the petitioner. (R. 130-131).

Despite external pressure on the Grieder factory produced by a strict production schedule and work undertaken on a quotation rather than "cost-plus" basis (R. 279, 281), the impossible was not expected of Clabaugh or of any other novice. (R. 245, 291). He was assigned to a simple hand milling operation. (R. 106, 348). He received the benefit of continued supervision and advice. (R. 277). The W.P.A. graduate was not a finished product, nor was he expected to be. (R. 275, 287). He was hired in the hope that he would increase in skill and efficiency. (R. 287). When employees did improve, they were given current wage increases and retained. (R. 197, 291). When it became evident that improvement was improbable, they were released. (R. 349, 351, 352). During the five or six weeks Clabaugh was on the Grieder pay roll, he did not improve and by his own admission he received no increase in pay.

(R. 115). Just as Clabaugh's hiring and treatment were a part of the regular Grieder policy, so also was his discharge. Other trainees of caliber superior to Clabaugh's were released because their work did not merit retention. (R. 245, 291, 351, 352). The fact that Clabaugh belonged to the union certainly should not have made him immune to the consequences of his own incompetency.

It was for that incompetency that Clabaugh was discharged. There is no evidence in the record showing that the Grieder Company was even aware of Clabaugh's union activities. He was not, as others had been, a union member when he began work. (R. 106, 288). His discharge occurred prior to the day on which union buttons were first worn in the Grieder plant. (R. 131, 195). The Board's finding, therefore, presents the case of a man being discharged for union activities when there is absolutely no proof that those activities were known to the employer who discharged him.

The best that can be said for Clabaugh's record in the Grieder plant is that he himself testified he had never been reprimanded for his work—he likewise admitted, however, that he had never been complimented on his work. (R. 108, 109, 124). Clabaugh's testimony in his own favor is not only weak but is also unreliable; Clabaugh perjured himself on the stand on at least two occasions. (R. 126-128, 131; 119-122).

Clabaugh's incompetence and misconduct are established beyond refutation by the testimony of his superiors, by the testimony of other employees in the plant, and by the testimony of his fellow union workers. Clabaugh's discharge slip read: "Late starting work, excessive smoking on job. To (*sic*) much talking and visiting other machine. Do not rehire". (R. 393). Three supervisors of Clabaugh testified at the hearing concerning the reasons for Clabaugh's discharge. They were Superintendent

Strothers, Vice President Dunlap, and President Grieder.

Superintendent Strothers testified that he told Clabaugh many times to cut down on smoking (R. 236); that notwithstanding these warnings Clabaugh continued to smoke constantly, in spite of the fact that the machine he was operating required the use of both hands, and that smoking interfered with his operation of the machine (R. 237, 238); that he warned Clabaugh several times against the practice of constantly visiting other operators and impeding their work (R. 238); that Clabaugh spoiled more work than the average employee (R. 239); that Clabaugh was always late in starting work and was the worst visitor in the plant (R. 245); that Grieder and Dunlap continually complained to him about Clabaugh's derelictions (R. 247, 248); that every time he saw Clabaugh, Clabaugh was either getting a drink or smoking (R. 255); and that Grieder frequently complained about Clabaugh smoking and visiting and told him to let Clabaugh go if he didn't cut out so much smoking and visiting. (R. 246, 247).

President Grieder testified that Clabaugh's work was very poor (R. 275); that he spoke to Strothers about the poor quality of Clabaugh's work (R. 275); that Clabaugh was an excessive smoker (R. 275); that the operation of Clabaugh's machine required the use of both hands (R. 276); that the difference between Clabaugh's smoking and the smoking of other workers was that Clabaugh smoked constantly (R. 276); that Clabaugh was constantly talking with other workers (R. 288); that he was always going over to other machines and bothering other employees (R. 276, 277, 288); that Clabaugh was late getting started in the morning and at noon (R. 278); that Clabaugh had too much scrap (R. 275, 279-281); and that his warnings to Clabaugh went unheeded. (R. 276, 289).

Dunlap testified that every time he had occasion to go into the plant, he saw Clabaugh talking (R. 347, 349);

that Clabaugh was always 10 to 15 minutes late getting started after lunch (R. 347); that other employees who were warned for similar misbehavior mended their ways, but not Clabaugh (R. 349, 350); and that he made out Clabaugh's separation slip a couple of hours after his discharge. (R. 350).

The supervisory judgments of Clabaugh which prompted his discharge were accurate judgments. They were shared by the men who worked by his side on other machines. One employee testified that although he had to tend to his own machine he observed that Clabaugh was smoking constantly and was also talking "off and on". (R. 215). This employee testified that if Clabaugh had not been warned for his misconduct "it was a wonder". (R. 216).

The Board's own witnesses unconsciously collaborated the foregoing testimony. Clabaugh's fellow complainant and co-union worker and organizer testified that he had observed Clabaugh smoking and talking to other workers "at his machine", "at another machine", "at the tool crib", and "all over the plant for that matter". (R. 201, 202). When asked whether this conduct of Clabaugh's had occurred while Clabaugh's machines were in operation, this Board witness, who had already testified that he could observe Clabaugh's work (R. 201), replied that he "wouldn't know". (R. 202). When asked if he had ever seen Clabaugh "loafing around", he "wouldn't say". (R. 202).

The facts above constitute the record upon the discharge which the Board and the United States Circuit Court of Appeals have found was discriminatory.

On July 27, 1942, a consent election was held in petitioner's factory to determine the bargaining representative for petitioner's employees. (R. 90). Three weeks later, the National Labor Relations Board accredited the CIO as such representative. (R. 92). Thereafter, in October and November of 1942, petitioner's representatives and repre-

sentatives of the accredited union met several times and discussed terms for a proposed contract. (R. 178, 181, 322-324). These conferences, conducted in admitted good faith, resulted in petitioner's agreement to the adoption of thirty-nine of the union's proposals, including recognition of the accredited union as the sole bargaining agent for all of petitioner's employees. (R. 174-184, 373-385). The last of these conferences was held on November 16, 1942. (R. 325). On that date, the union representatives refused to bargain further and demanded that petitioner agree immediately to the union's proposals for a closed shop and blanket wage increases. (R. 168, 187, 188, 363, 364). When petitioner requested further discussion, the union representatives broke off the conference and "walked out" of the conference room. (R. 168, 188). Neither the union nor petitioner afterward asked for renewal of negotiations. (R. 189, 213, 332, 366).

On May 29, 1943, after the usual proceedings pursuant to Section 10 of the Act, the National Labor Relations Board entered its decision and order requiring petitioner to bargain collectively upon request, to notify its employees that they may become or remain members of the CIO-affiliated union without fear of discrimination, and to reinstate Henry Clabaugh with back pay. (R. 75-80). On April 13, 1944, the United States Circuit Court of Appeals for the Sixth Circuit, with Judge Simons dissenting in part, affirmed the Board's decision and decreed enforcement of the Board's order. (R. 295-402). Petitioner seeks writ of *certiorari* to review that decision of the Circuit Court of Appeals.

Questions Presented

1. Can petitioner be required to post notices that its employees may without fear of discrimination become or remain members of *one* particular union?

2. Must an employer initiate renewal of bargaining which has been broken off by the union?

3. Does the unsupported and completely contradicted testimony of a discharged employee constitute substantial evidence that his discharge was discriminatory?

Reasons Relied On For Allowance Of The Writ

I. THE ORDER THAT PETITIONER POST NOTICES THAT ITS EMPLOYEES MAY WITHOUT FEAR OF DISCRIMINATION BECOME OR REMAIN MEMBERS OF ONE PARTICULAR UNION IS CONTRARY TO LAW.

In Section 2(d) (3) of its order (R. 79), the Board ordered petitioner to post notices that its employees "are free to become or remain members of the International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, and that petitioner will not discriminate against any employee because of membership or activity in such an organization".

Obviously, the decision of the United States Circuit Court of Appeals for the Sixth Circuit sustaining this portion of the Board's order, is in conflict with the decisions of the United States Circuit Court of Appeals for the Second Circuit in *Westinghouse Electric & Mfg. Co. vs. N. L. R. B.*, 112 F. (2d) 657; *N. L. R. B. vs. Standard Oil Co.*, 138 F. (2d) 885, and *N. L. R. B. vs. Elizabeth Arden, Inc.*, 139 F. (2d) 488, with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in *De Bardeleben et al. vs. N. L. R. B.*, 135 F. (2d) 13, with the decision of the United States Circuit Court of Appeals for the Eighth Circuit in *Cudahy Packing Co. vs. N. L. R. B.*, 102 F. (2d) 745, and with the decision of the United States

Circuit Court of Appeals for the Tenth Circuit in *Colorado F. & I. Corp. vs. N. L. R. B.*, 121 F. (2d) 165. The United States Circuit Courts of Appeals for the Second, Fifth, Eighth, and Tenth Circuits, upon the principal that "the purpose of the Act is to leave the employees with a free choice" and not "subject them to the compulsion of their employer, outside labor union, the Labor Relations Board, or anybody else as to what is their best interest in joining or forming labor organizations" because "the act was not passed, it may not be used for the purpose of forcing the seating of nationally affiliated labor organizations contrary to the real wishes of the employees" (*De Bardeleben et al. vs. N. L. R. B.*, 135 F. (2d) 13, 15), have revised the terms of the notices which employers must post to read that employees are "free to join or not join any labor organization" (*Cudahy Packing Co. vs. N. L. R. B.*, 102 F. (2d) 745).

If the petitioner should ultimately be required to post a notice, the form of that notice will be particularly important because a union not affiliated with the CIO has conducted a membership campaign among petitioner's employees and has petitioned the Board for certification as the accredited bargaining representative. (R. 221-226). The United States Circuit Court of Appeals was aware of the activities of this other union when the court ordered petitioner to post the notice specified by the Board. (R. 399).

This court should decide whether the National Labor Relations Board has the power under these circumstances to order an employer to post a notice that his employees may without discrimination join or become members of one particular union. The decision of this court will resolve the conflict which now exists between the decisions of the various United States Circuit Courts of Appeals.

II. THE JUDGMENT THAT PETITIONER HAS REFUSED TO BARGAIN COLLECTIVELY SHOULD BE REVIEWED BY THIS COURT.

The decision that petitioner has violated its duty to bargain collectively should be reviewed because it is a decision "probably in conflict with applicable decisions of this court" (Supreme Court Rule 38, par. 5(b)).

The present decision holds that an employer must request renewal of bargaining conferences broken off by employees' representatives. Such a decision is in conflict with the decisions of this court in *N. L. R. B. vs. Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332, and should be reviewed for that reason.

The United States Circuit Court of Appeals erroneously assumed petitioner's position to be that although petitioner had refused to continue negotiations on November 16, 1942, such refusal was justified by petitioner's receipt of notice that a second union had asked to be certified as the bargaining agent of petitioner's employees. Thus, the court passed over the actual reason for termination of the bargaining between petitioner and the already accredited union with the statement that:

> "* * * We do not go into detail touching the evidence as to what caused the break in negotiations on November 16th. * * *" (R. 398).

The court continued by stating that:

> "* * * It is enough to say that the Union's representatives insisted upon going forward and respondent's contention was that in view of the Regional Director's letter of November 16th it doubted the advisability of further recognizing the status of the Union as bargaining agent. * * *" (R. 398).

The court then declared that an employer's doubts as to the propriety of an established certification do not justify

his refusal to bargain with the certified union and that if petitioner had such doubts, it should have communicated with the Regional Director "as it had been invited to do in the letter of November 13, 1942". (R. 399).

The court clearly misstated the facts. Reference to the letter of November 13, 1942 (R. 387), shows that petitioner was advised only that the petition of the intervening union had been assigned to a Field Examiner who was to communicate with petitioner in the course of his investigation. Nowhere was the petitioner invited to communicate with the Regional Director. Furthermore, what is even more important, the court below improperly appraised the real issue as to this matter. We submit that the fact that the petitioner received notice of another union's intervention is a fact entirely irrelevant to the issue in this case.

The notice of intervention had simply one effect upon the November 16, 1942, bargaining conference between petitioner and the accredited union. Because the notice had arrived immediately prior to the conference, petitioner's representatives asked for a recess to enable them to discuss the significance of the notice. (R. 326). The notice had no other effect. When the twenty-minute recess ended, petitioner's representatives walked back into the conference room and stated that they were ready to continue bargaining. (R. 186, 362). There is no dispute upon this evidence. Nor is there any dispute on the evidence that negotiations were then entered into and continued for a period variously estimated by the union's and petitioner's representatives as between one and two hours. (R. 326, 329, 363). There is no dispute that the negotiations after the recess on November 16 were *bona fide* and resulted in agreement upon such matters as the duration of the prospective contract. (R. 326). There is, finally, no dispute on the record evidence that the last bargaining conference terminated because the union representatives "walked

out" when petitioner's representatives, who had already consented to a large part of the union's demands, were not ready without further discussion to agree to the remainder. (R. 168-170, 188).

There is no escape from these facts. The issue in this case is now and always has been whether an employer must initiate renewal of bargaining broken off because disgruntled union bargainers refused to continue negotiations. The uncontradicted evidence in this case shows that the union representatives became impatient, walked out, filed charges, and never attempted after that to meet with the petitioner. There is absolutely no evidence that the petitioner at any time refused to continue negotiations.

The appellate court's decision upon this issue is contrary to the decisions of this court in *N. L. R. B. vs. Columbian Enameling & Stamping Co., Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332, and should therefore be reviewed by this court.

III. THE UNSUPPORTED AND COMPLETELY CONTRADICTED TESTIMONY OF CLABAUGH DOES NOT CONSTITUTE SUBSTANTIAL EVIDENCE.

The reinstatement order in this case was entered upon the uncorroborated testimony of the complainant. Every other relevant portion of the record refutes that testimony. As stated by dissenting Judge Simons of the Circuit Court of Appeals:

> "* * * There is cumulative evidence that Clabaugh was a poor workman, wasted his time, and was a destructive influence in the plant, and this quite apart from his union activity. It is true that Clabaugh himself challenged this evidence, but upon this record Clabaugh's evidence, insofar as it is unsupported by other witnesses or reasonable inferences, is not entitled to belief by reasonable men, and so does not rise to the dignity of substantial evidence." (R. 402).

The order of reinstatement means that an employer cannot discharge an active union worker regardless of that worker's incompetence and misconduct. It is an order which directly contradicts this court's decisions in *N. L. R. B. vs. Jones & Laughlin Steel Corporation,* 301 U. S. 1, and *The Associated Press vs. N. L. R. B.,* 301 U. S. 103, that the National Labor Relations Act does not take away the employer's right to discharge an unsatisfactory employee. The petitioner together with every other employer of union labor is entitled to know if the present order is valid. The growth of unionism in this country makes the importance of the issue obvious. Does union activity provide job insurance?

This issue is more than another application of the standard that an order of the Board must be based upon substantial evidence. *Consolidated Edison Company of New York vs. N. L. R. B.,* 305 U. S. 197. The *character* of the evidence in the present case—the discharged employee's own testimony versus the rest of the record—presents the qualitative issue of whether union activity immunizes a worker to discharge. Particularly is this true where the record shows Clabaugh perjured himself on the stand on at least two occasions. (R. 126-128, 131; 119-122). This issue clearly deserves the consideration of this court.

Moreover, the decision here conflicts with the decisions of the United States Circuit Courts of Appeals for the Second and Fifth Circuits. In *Ballston-Stillwater Manufacturing Co. vs. N. L. R. B.,* 98 F. (2d) 758, the Circuit Court of Appeals for the Second Circuit was asked to decide whether the National Labor Relations Board can order a worker reinstated because of his own testimony, contradicted by the testimony of his foreman and fellow workers. That court declared:

> "* * * The inference that Ippoliti was discharged because of her CIO membership instead of her violation of the rule and her habitually poor work is

> too arbitrary to stand. To sustain it on such a record would grant to members of a complaining union absolute immunity from discharge for inefficiency."

In *N. L. R. B. vs. Williamson-Dickie Manufacturing Co.*, 130 F. (2d) 260, the Circuit Court of Appeals for the Fifth Circuit was asked to decide the same question. It declared:

> "'* * * If real grounds for discharging him had not been shown, or if he had been discharged for trivial or fanciful reasons, these facts would have supported an inference that he was discharged for union activity, but when the real facts of the discharge appear, these facts are stripped entirely of probative force. For it is settled by the decisions that membership in a union is not a guarantee against discharge, and that when real grounds for discharge exists, the management may not be prevented, because of union membership, from discharging for them.'"

The facts of the present case call even more clearly than did the facts in the cited case for application of their rule that:

> "'* * * when real grounds for discharge exist, the management may not be prevented, because of union membership, from discharging for them.'"

Therefore, because the decision appealed from both presents an important but unsettled question of federal law and conflicts with the decisions of other Circuit Courts of Appeals, the decision should be reviewed by this court.

Conclusion

The decision of the court below that petitioner must post notices that its employees are free to become or remain members of *one particular union* is in direct conflict with the decisions of the United States Circuit Courts of

Appeals for the Second, Fifth, Eighth, and Tenth Circuits. Moreover, the court's decision that petitioner has refused to bargain collectively conflicts with this court's decision in *N. L. R. B. vs. Columbian Enameling & Stamping Company, Inc.*, 306 U. S. 292, and *N. L. R. B. vs. Sands Manufacturing Company*, 306 U. S. 332. Finally, the decision that the entirely uncorroborated and completely contradicted testimony of a discharged employee constitutes substantial evidence that his discharge was discriminatory, presents an important and unsettled question of federal law, and is a decision in conflict with the decisions of the United States Circuit Courts of Appeals for the Second and Fifth Circuits in *Ballston-Stillwater Manufacturing Co. vs. N. L. R. B.*, 98 F. (2d) 758, and *N. L. R. B. vs. Williamson-Dickie Manufacturing Co.*, 130 F. (2d) 260.

For these reasons, we submit that this petition for a writ of *certiorari* to the United States Circuit Court of Appeals for the Sixth Circuit should be granted.

Respectfully submitted,

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No. 434

In the Supreme Court of the United States

October Term, 1946

Grinnell Machine Products Co.,

Petitioner,

v.

National Labor Relations Board,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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In the Supreme Court of the United States

OCTOBER TERM, 1944

No. 234

GRIEDER MACHINE TOOL & DIE COMPANY,
PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 396–402) are not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 75–80, 37–72) are reported in 49 N. L. R. B. 1325.

JURISDICTION

The decree of the court below (R. 395) was entered on April 13, 1944. The petition for a

writ of certiorari was filed on July 6, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether, upon findings that petitioner discouraged membership in a particular labor organization, the Board abused its discretion in requiring petitioner to post notices stating that its employees were free to become or remain members of that organization and that petitioner would not discriminate against any employee because of his membership or activity in any such organization, without adding a statement that the employees were free to join any labor organization of their choosing.

Two further questions are urged by petitioner which, we think, are not properly presented in this case. These questions are as follows:

2. Whether the Act requires an employer to initiate a resumption of bargaining negotiations broken off by the statutory bargaining representative of its employees.

3. Whether testimony by a discharged employee warranting a finding of discrimination constitutes, if believed by the Board, substantial evidence for such a finding notwithstanding that the testimony is wholly contradicted and is not supported by other evidence.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set out in the Appendix, *infra*, pp. 17–18.

STATEMENT

Upon charges filed by the International Union, United Automobile, Aircraft, and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations (R. 28–29), hereinafter called the Union, and upon the usual proceedings, the Board, on May 29, 1943, issued its findings of fact, conclusions of law, and order (R. 75–80, 37–72). The facts, as found by the Board and as shown by the evidence, may be summarized as follows:[1]

On April 17, 1942, petitioner's employees Henry Clabaugh and William Rudolph called at the C. I. O. headquarters at Toledo, Ohio, where they were given membership-application forms and were appointed the Union's organizers and its temporary officers at petitioner's Bowling Green, Ohio, plant (R. 39–40; 106). They at once began to enroll their fellow workers as members of the Union, and within a short time membership meetings were held (R. 40; 94–99, 101–104, 106, 253). During the week in which Clabaugh began to organize, Plant Superintendent Strothers ques-

[1] In the following statement, references preceding the semicolons are to the Board's findings, including the findings of the Trial Examiner which the Board adopted (R. 76); and succeeding references are to the supporting evidence.

tioned him on two separate occasions about the Union's progress (R. 40; 107). Strothers also asked employee Orval Markley several times whether he had attended union meetings and how many employees were present (R. 40; 97–98, 253).

On April 25, 1942, a week after he had begun to solicit membership for the Union, Clabaugh was discriminatorily discharged (see pp. 5–7, *infra*). Two days later, Rudolph was also discharged (R. 40–41, 195).[2] Following their discharge, Clabaugh and Rudolph continued their efforts to unionize petitioner's workers (R. 41; 112–113, 124–125, 198–199). They conversed with the employees and passed out union handbills in the public street adjacent to the plant (R. 41, 76–77; 112–113, 124–125, 198–199, 206, 208). For the purpose of depriving them of access to its employees, petitioner repeatedly summoned the police and urged the police to put a stop to the organizational activities of Clabaugh and his associates (R. 76–77, 41; 256–261, 154–159, 112–113, 124–126, 131–132, 206–208).

In May 1942, the Union filed a petition with the Board for certification as the exclusive bargaining representative of the Company's employees (R. 41; 82). At the hearing on this petition, the Company consented to an election (R. 56; 90–92). A few days before the hearing, employee Robert Nye, who had been requested by the C. I. O. to

[2] The Board adopted the Trial Examiner's finding that Rudolph's discharge was not discriminatory (R. 79, 52–56).

be present (R. 210), asked his foreman, William Beck, for permission to attend (R. 42; 209–210). Foreman Beck turned down Nye's request, saying that attendance at the Board hearing would "probably cost [Nye] his job" (R. 42; 210). On the day of the hearing, however, Nye obtained permission from Superintendent Strothers and attended the hearing (R. 42; 211–212, 234–235). President Grieder upbraided Nye on the latter's return (R. 42–43; 146–147). In censuring Nye, Grieder declared: "The C. I. O. called you to that election, didn't they?" and, in response to Nye's admission that such was the case, Grieder retorted: "They are a bunch of drunken bums. Go home and I will see how I feel tomorrow" (R. 43; 147).

Henry Clabaugh, as has been noted (p. 3, *supra*), initiated and was the leader in the movement to organize petitioner's workers; he was the chairman of the Union's organizing committee (R. 45; 106). Superintendent Strothers asked Clabaugh "how the Union was coming" (R. 45; 107), and, despite Clabaugh's profession of ignorance concerning the Union, Strothers later repeated this question and asked Clabaugh when the Union intended to have its membership meetings (R. 45; 107–108).[3]

[3] When Strothers was asked at the hearing whether he knew that Clabaugh was a member of the Union, he evasively replied: "* * * I couldn't positively say he was a member" (R. 252).

On the morning of July 25, 1942, the day of his dismissal, Clabaugh was delayed in beginning his work for about 45 minutes because of circumstances beyond his control (R. 50; 109). Observing this, Superintendent Strothers questioned Clabaugh and accepted his explanation for the delay without comment (R. 50; 109). About 3 o'clock that afternoon, however, Strothers, after talking to President Grieder, discharged Clabaugh, assertedly because of his lateness in starting work that morning (R. 50; 109–110, 246). When Strothers told Clabaugh of the asserted reason for the discharge, Clabaugh inquired: "Is that the only reason, or is it the Union?" to which Strothers replied, "What do you think?" (R. 50; 110). Strothers, in Clabaugh's presence, filled in a separation slip assigning Clabaugh's lateness in starting work as the sole reason for the dismissal (R. 50–51; 110). The slip, as Clabaugh received it through the mail, contained additional reasons that, purportedly, motivated the discharge (R. 51; 110), namely, that Clabaugh had smoked excessively in the plant and had too frequently engaged in conversation with other employees during working hours (R. 51; 110, 393).[4] However,

[4] At the hearing, petitioner enlarged upon these reasons by asserting that Clabaugh was not a competent workman (R. 45; 116). This belated charge was refuted, as the Board noted (R. 45), by proof that Clabaugh spent a training period of 4 weeks in petitioner's plant prior to his employment, and that petitioner hired him after having had this opportunity to observe his work (R. 113–114, 242–243, 286–287).

smoking had been permitted during working hours, as had conversation among the employees (R. 46–47; 276, 122–123, 251), and Clabaugh had never been reprimanded on either score (R. 122–124).

The appropriateness of the bargaining unit was stipulated in the representation proceeding previously mentioned (R. 56, 77; 84). On July 27, 1942, the Union won the election, and on August 18, 1942, the Board certified that the Union was the exclusive bargaining representative of the aforesaid unit (R. 56; 90–92). On August 31, 1942, when a Union representative called upon President Grieder for the purpose of arranging a bargaining conference, Grieder refused to deal with the Union, asserting that the Board certification "didn't count any more because all the C. I. O. people were gone" (R. 57; 161). Grieder also informed the Union representative that he would consult his attorney in regard to the Union's bargaining request (R. 162). Subsequently, petitioner's secretary and its attorney met with the Union's representatives on several occasions to discuss the Union's contract proposal (R. 58; 162).

While these discussions were under way, a group of employees opposed to unionization of the plant, who called themselves the "Association," filed a petition with the Board alleging that a question concerning the representation of petitioner's employees had arisen (R. 59; 221, 224,

225, 226–229, 387). The Board's Regional Director notified petitioner of this by letter, dated November 13, 1942, stating that an examiner had been assigned to investigate the matter and that petitioner should "address any inquiries or communications to him" (R. 59; 387). On November 16, 1942, petitioner's representatives informed the Union representatives of this letter and stated that "they felt that legally they couldn't deal" with the Union "due to this matter pending before the Board" (R. 60; 185). When petitioner's representatives persisted in this stand, the Union representatives announced an intention to file unfair labor practice charges with the Board, to which one of petitioner's representatives replied, "you go ahead * * * and we will let the Government settle it" (R. 61; 189). The conference of November 16 ended with petitioner adhering to its refusal to accord the Union the recognition to which it was entitled as the certified bargaining representative of petitioner's employees (R. 185–189, 167–170).

On the day following this meeting, the Board's Regional Director sent petitioner a copy of a letter that he sent to the Association, dated November 17, 1942, informing the Association that its petition had been "carefully investigated and considered" but that, "further proceedings [did] not seem warranted". The letter also stated that the Association could obtain a review of the

Regional Director's action by filing a request therefor. (R. 62; 386.) Petitioner's attorney, on receipt of this letter, communicated with the attorney for the Association and was informed that the latter intended to request a review by the Board of the Regional Director's action (R. 62; 330). Petitioner never attempted to resume the bargaining negotiations broken off on November 16, nor has it receded from its withdrawal of recognition from the Union on that date (R. 63; 170, 331).[5]

The Board concluded that petitioner had discriminatorily discharged Clabaugh in violation of Section 8 (3) of the Act (R. 51), had refused on November 16, 1942, and thereafter to bargain collectively with the Union in violation of Section 8 (5) of the Act (R. 63–67) and by each of these acts as well as by the activities of President Grieder, Superintendent Strothers and Foreman Beck, including Strothers' questioning of employees concerning their union activities, the incidents involving the police, and the incidents involving Nye, had interfered with, restrained and coerced its employees in violation of Section 8 (1) of the Act (R. 43–44, 51, 67, 76–77).

[5] After the close of the Board's hearing in this case, the Board dismissed the Association's appeal from the Regional Director's refusal to proceed on its petition, and on February 8, 1943, the Regional Director informed petitioner of this. At the oral argument before the Board, counsel for petitioner stated that neither petitioner nor the Union had communicated with each other since November 16, 1942.

The Board's order, issued May 29, 1943, required petitioner to cease and desist from its unfair labor practices; to reinstate Clabaugh with back pay; to bargain collectively with the Union; and to post notices (R. 77–79).

Thereafter, the Board filed a petition in the court below requesting enforcement of its order (R. 1–5). On April 13, 1944, the court handed down its opinion (R. 396–402) and entered a decree (R. 395), enforcing the Board's order in full.

ARGUMENT

1. Petitioner contends (Pet. 9–10) that the Board abused its discretion in ordering petitioner to post notices stating without more that its employees were free to become or remain members of the particular labor organization which petitioner had opposed, and that petitioner would not discriminate against its employees because of membership or activity "in any such organization" (R. 79). In determining "how the effect of prior unfair labor practices may be expunged" (*International Ass'n of Machinists* v. *National Labor Relations Board*, 311 U. S. 72, 82), the Board could reasonably find, as it did, that it would effectuate the policies of the Act to require the offending employer to assure its employees in specific terms that they could join a union without fear of reprisal and that this guaranty extended to the particular union that had been the target of its unfair labor

practices. Such a provision is "adapted to the situation which calls for redress." *National Labor Relations Board v. Mackay Radio & Telegraph Co.*, 304 U. S. 333, 348. While several circuit courts of appeals have, in the cases cited at pages 9 and 10 of the petition for certiorari, provided for the inclusion in such notices of the further statement, in substance, that the employees were free to join any union, these courts have in other cases, some of which are subsequent to those cited by petitioner, enforced posting requirements identical with the one here in controversy.[6] This

[6] See, *e. g.*, *National Labor Relations Board* v. *Regal Knitwear Co.*, 140 F. (2d) 746 (C. C. A. 2), enforcing 49 N. L. R. B. 560, 562; *Greenport Basin & Construction Co.* v. *National Labor Relations Board*, 132 F. (2d) 857 (C. C. A. 2), enforcing 42 N. L. R. B. 377, 403; *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 F. (2d) 586, 589 (C. C. A. 2), certiorari denied, 313 U. S. 594, enforcing 39 N. L. R. B. 501, 529; *National Labor Relations Board* v. *Brown Paper Mill Co. Inc.*, 133 F. (2d) 988, (C. C. A. 5), enforcing 36 N. L. R. B. 1220, 1244–1245; *National Labor Relations Board* v. *Hawk & Buck Co. Inc.*, 120 F. (2d) 903 (C. C. A. 5); *National Labor Relations Board* v. *Oklahoma Transportation Co.*, 140 F. (2d) 509, 510 (C. C. A. 5), enforcing 50 N. L. R. B. 907, 909–910; *National Labor Relations Board* v. *Richter's Bakery*, 140 F. (2d) 870, 873 (C. C. A. 5), certiorari denied, May 29, 1944, No. 970, October Term, 1943, enforcing 46 N. L. R. B. 447, 453; *Carter Carburetor Corp.* v. *National Labor Relations Board*, 140 F. (2d) 714 (C. C. A. 8), enforcing 48 N. L. R. B. 354, 361; *Gamble-Robinson Co.* v. *National Labor Relations Board*, 129 F. (2d) 588 (C. C. A. 8), enforcing 33 N. L. R. B. 351, 367; *National Labor Relations Board* v. *Denver Tent and Awning Co.*, 138 F. (2d) 410 (C. C. A. 10), enforcing 47 N. L. R. B. 586, 587–588; *National Labor Relations Board* v. *Moore-Lowry Flour Mills Co.*, 122 F. (2d) 419, 429 (C. C. A. 10).

indicates that these courts have adopted no hard and fast rule, but vary their decision according to the facts presented. Moreover, even if the decisions of the various circuit courts of appeals on this point could be regarded as in conflict, the numerous minor changes made by the courts in the wording of the notices would not raise an issue of sufficient importance to warrant the granting of a writ of certiorari. The Court has denied two petitions by employers for writs of certiorari which raised the same question that petitioner here urges. *Baltimore Transit Company* v. *National Labor Relations Board,* No. 735, October Term, 1943 (Pet. 7, 12, 29–30), certiorari denied, April 3, 1944; *Aintree Corporation* v. *National Labor Relations Board,* No. 702, October Term, 1942 (Pet. 3, 17–18, 23, 25–27), certiorari denied, 318 U. S. 774. Indeed, the notices in each of these cases required a statement without more that the employer would not discriminate against the employees because of their membership in the particular unions which had been the target of the unfair labor practices, whereas in the instant case the required assurance extends not only to the particular union but petitioner is required to affirm that it "will not discriminate against any employee because of his membership or activity in any such organization" (R. 79). Thus, the argument that the form of notice may mislead the em-

ployees into the mistaken belief that they can join only the Union named in the notice (Pet. 10) is without merit.

2. The second question that petitioner seeks to raise, namely, "Must an employer initiate renewal of bargaining which has been broken off by the union?" (Pet. 9, 11–13) is not, we submit, present in this case because it assumes a state of facts contrary to the evidence and contrary to the Board's findings, concurred in by the court below.

The evidence affords more than adequate support for the Board's findings that the negotiations ended on November 16, 1942, not as petitioner asserts (Pet. 12–13), because it was unwilling to agree to certain of the Union's contract demands, but because petitioner took the position that, despite the Board's certification of the Union, it would no longer recognize the Union as the exclusive bargaining agent of its employees (R. 60–61, 64; 167–170, 184–189, 329, 337–338, 342–344). Furthermore, the Board, on reviewing the entire record (R. 65–66, 76), found that on November 16, petitioner "deliberately seized upon the opportunity afforded it by the Regional Director's letter of November 13 [*supra,* p. 8] to bring an end to negotiations in which it was plainly an unwilling participant" (R. 66, 76). The Board also found (R. 66–67) that even if it had believed petitioner's

assertion that the Regional Director's letter of November 13 raised an honest doubt in petitioner's mind respecting its continuing duty to recognize the Union, that doubt should have been dispelled when petitioner received the letter of November 17 from the Regional Director (*supra*, p. 8), informing it of the Director's rejection of the Association's petition (R. 66). Hence the central fact that underlies the violation found in this case is that the negotiations terminated on November 16 because petitioner in bad faith took the position that it would no longer accord the Union the recognition to which the Union was entitled by virtue of the recently issued certification. The court below did not disturb this or any other finding of the Board. On the contrary, the court below expressly said: "We do not go into detail touching the evidence as to what caused the break in negotiations on November 16. It is enough to say that the Union's representatives insisted upon going forward and respondent's contention was that in view of the Regional Director's letter of November 16 it doubted the advisability of further recogizing the status of the Union as bargaining agent" (R. 398). In short, the factual premise on which the question that petitioner urges is based is contrary to the evidence and contrary to the concurrent findings of the Board and the court below.

3. It is believed that the third question that petitioner seeks to raise is likewise not present in the case. The question (Pet. 9, 13–15) is whether Clabaugh's[7] testimony, warranting an inference of discrimination, if true, constitutes substantial evidence for a finding of discrimination even though the testimony is contradicted in all respects and is unsupported by other evidence. Contrary to petitioner's assertion, however, the finding that Clabaugh's discharge was discriminatory does not rest solely on his own testimony; it is also cogently supported, as the evidence previously summarized reveals (pp. 3–7, *supra*), by a congeries of undisputed circumstances and by the impausibility of petitioner's belated explanations for the discharge. Furthermore, as this Court has repeatedly held, the Board has the exclusive province "of appraising conflicting and circumstantial evidence, and the weight and credibility of testimony." *National Labor Relations Board* v. *Link-Belt Co.*, 311 U. S. 584, 597. The cases relied upon by petitioner (Pet. 14–15) turn on their facts and do not show a conflict.

CONCLUSION

The decision below is correct and presents neither a conflict of decisions nor any question of

[7] Clabaugh was discharged on July 25, 1942, and the Board subsequently ordered his reinstatement with back pay. (See Statement, *supra*, pp. 5–7, 10.)

general importance. The petition should therefore be denied.

Respectfully submitted.

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JULY 1944.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, 49 Stat. 449, 29 U. S. C. 151 *et seq*) are as follows:

> SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.
>
> SEC. 8. It shall be an unfair labor practice for an employer—
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.
>
> * * * * *
>
> (3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *
>
> * * * * *
>
> (5) To refuse to bargain collectively with the representatives of his employees * * *
>
> * * * * *
>
> SEC. 10.
>
> * * * * *
>
> (c) * * * If upon all the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its

findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action, including reinstatement of employees with or without back pay, as will effectuate the policies of this Act. * * *

* * * * *

(e) * * * The findings of the Board as to the facts, if supported by evidence, shall be conclusive.

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